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NO. 93-2094

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

IN THE MATTER OF:

DONALD MARK GARRINGER

On Petition for Writ of Certiorari
to the Indiana Supreme Court

REPLY BRIEF

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16 pp

TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....ii

Additional Rule Involved..... 1

Argument

I. The Petitioner Exhausted His Remedy To Preserve Record On Review.....2

II. The Petitioner Does Raise a Substantial Question That the Underlying Proceeding Deprived The Petitioner of Due Process.....3

III. The Petitioner's First Amendment Claims Were Properly Raised Below.....6

IV. The Petitioner Raises A Substantial First Amendment Claim.....8

Conclusion.....12

TABLE OF AUTHORITIES

Cases

Garrison -v- Louisiana, 379 U.S. 64 (1964)....9

In Re: Graham, 453 N.W.2d 313 (Minn.-1990)...11

In Re: Grand Jury Proceedings and In Re: Jim's Garage, 119 Bankruptcy Reporter 945 (E.D. Mich.- 1989).....2

New York Times -v- Sullivan, 376 U.S. 254.....7

Pavlic & LeFlore -v- Marvel Comics Group, 493 U.S. 120, 123, 107 L.Ed.2d 438, 110 S.Ct. 456 (1989).....10

Rules

18 U.S.C. Sec. 152.....6

Rule 22 of the Indiana Admission and Discipline Rules.....11-12

Rule 23, Section 15(c), of the Indiana Rules of Admission and Discipline.....1-2

Rule 1.15 of the Indiana Rules of Professional Conduct.....6

Rule 8.2(a) and Rule 8.4(d) of the Indiana Rules of Professional Conduct.....10

ADDITIONAL RULE INVOLVED [1]

Rule 23, Section 15(c) of the Indiana Rules of Admission and Discipline:

"In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue. Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review. Any transcript filed must be settled,signed and certified as true and correct by the hearing officer. The fee paid for procuring a transcript or additional transcript shall be included in the costs of the disciplinary proceeding."

Footnote 1 - The Brief In Opposition cites a portion of this Rule without edtiorial punctuation to indicate editing. Brief In Opposition at 8.

I. THE PETITIONER EXHAUSTED HIS REMEDY TO PRESERVE RECORD ON REVIEW.

The Respondent (hereafter,"Lundberg") asserts in his third reason for denying the petition that the Petitioner (hereafter, "Garringer") failed to preserve record below. Brief in Opposition at 7. The record shows that Garringer promptly ordered transcript, citing Rule 23, Section 15(c) of the Indiana Rules of Admission and Discipline as the authority to do so. Id.

Garringer's ordering of transcript is identical to Garringer's subpoena to Lundberg for information concerning collections of Schedule B-1 accounts of Wade Trucking. B. App 10 and 11-14 of Petition. It is "public record", wherever located, that is in the exclusive custody and control of respondent. In Re: Grand Jury Proceedings and In Re: Jim's Garage, 119 Bankruptcy Reporter 945 (E.D.Mich.-1989), cited at 15 of Petition. Garringer cannot get them to do what they do not want to do. Garringer can only exhaust his remedy and do his best.

II. THE PETITION DOES RAISE A SUBSTANTIAL QUESTION THAT THE UNDERLYING PROCEEDING DEPRIVED THE PETITIONER OF HIS RIGHTS TO DUE PROCESS.

At Reason Four of the Brief in Opposition, Lundberg states: "The petitioner was not deprived of an opportunity to cross-examine the witnesses who testified against him, nor was he deprived of an opportunity to present evidence in his own defense." Brief in Opposition at 10. This appears to be a material fact in dispute. See, Petition at 8-9.

The record is clear that Garringer was not availed the opportunity to cross-examine Lundberg, who testified against him by way of verified complaint. B.App. 11-14 of Petition. The record shows Garringer was not availed the opportunity to cross-examine the counsel for Merchants National Bank, whose letters and telephone calls to the Disciplinary Commission initiated the disciplinary proceeding.

As for witnesses called at hearing, Garringer was availed the opportunity to cross-examine the first witness called by Lundberg to the point where Garringer established that the witness had been the presiding judicial officer in charge of supervision of administration of the Wade bankruptcy from September, 1988, until July, 1989. Garringer asked what happened to the item of property identified as "Cal-Ark" on Schedule B-1. At that point, the Hearing Officer prohibited further cross-examination concerning the Wade bankruptcy since the court would not "retry" the Wade bankruptcy. See, Brief in Opposition at 9, citing the Indiana Supreme Court at 626 N.E.2d at 811, App. 9 of Petition.

Both the Indiana Supreme Court and Lundberg avoid discussing the pertinent fact that the Hearing Officer not only struck paragraph 4 of Lundberg's verified complaint alleging that Garringer "made false statements that he knew to

be false" [See, App. 10-11 of Petition], the Hearing Officer also struck paragraph 2 of the verified complaint alleging that Garringer "made false statements." They avoid this fact to avoid discussion of the procedural deficiencies in this matter. App. 10-11 of Petition.

As for being able to present witnesses and evidence in his own defense, Garringer admits that he was availed the opportunity to call the weatherman and ask about the weather tomorrow. However, not only would the Hearing Officer not "relitigate" the Wade bankruptcy, the complaint was amended to omit the allegation that Garringer made false statements. Thus, the Hearing Officer determined that the truth of Garringer's statements were immaterial and irrelevant, and nothing would be allowed in the record concerning the Wade bankruptcy.

Lundberg does not dispute the central fact demonstrated by the Petition that the State of Indiana is a kleptocracy where lawyers routinely

steal property that is entrusted to their care. Petition at 19-24, and Brief In Opposition, passim. Thus, it is clear why Lundberg does not want to testify in this matter. He may cite local rules concerning the confidentiality of his investigations to withhold information concerning the collections of Schedule B-1 accounts of Wade Trucking. See, B.App. 11-14 of Petition. However, an examination of Lundberg would reveal that this withholding of information is prohibited by the Laws of the United States, as well as local rule. 18 U.S.C. Sec. 152; Rule 1.15 of Indiana Rules of Professional Conduct. In other words, cross-examination is an engine of truth-telling that is an embarassment here. Id.

III. PETITIONER'S FIRST AMENDMENT CLAIMS WERE PROPERLY RAISED BELOW.

Lundberg is technically correct that Garringer did not raise his First Amendment

claims as to "freedom of utterance" below in the form of the first question presented for review in the Petition, and first reason why the Petition should be granted. Brief in Opposition at 3-4; Petition at 13.

However, Garringer has firmly and consistently raised the issue below as to whether there can be a finding of "reckless disregard of the truth" without a finding of falsity, as presented in the third question for review, and third reason why the Petition should be granted. Petition at 17. The crux of the error below was findings that Garringer made statements with "reckless disregard of the truth". App. 11-12 of Petition. Garringer raised the issue of this finding of reckless disregard for the truth, when the truth is ruled irrelevant and inadmissable for evidence. Garringer raised the relevant applicable law creating and defining the term. New York Times -v- Sullivan, 376 U.S. 254, and its progeny; See, Petition at 17. This is the

crux of Garringer's First Amendment claim. Infra. Garringer always firmly and consistently raised that claim. Passim.

Simply because an issue is appropriately elaborated for review by this Court does not mean that it has not been raised below. See, Petition at 13 and 17.

IV. THE PETITIONER RAISES A SUBSTANTIAL FIRST AMENDMENT CLAIM.

The crux of Garringer's First Amendment claim is that the lower court made a finding of reckless disregard of the truth without a finding of falsity. Petition at 17. Lundberg mischaracterizes this claim when he states that Garringer points out no "significant division of authority" whether a lawyer may be properly sanctioned for attacking the integrity of a judicial official with reckless disregard of truth or falsity. Brief In Oppsition at 6. However, Garringer does not dispute this.

Garringer disputes the evidentiary basis for making this finding, contrary to common law and common sense. Garrison -v- Louisiana, 379 U.S. 64 (1964), cited in Petition at 17.

Contrary to the characterization of the lower court that Garringer "admits" violations of attorney conduct rules [App.13-14 of Petition], Garringer has never admitted attorney misconduct. App. 7 of Petition. The ingredients for Garringer to admit that he made statements with disregard of the truth, and that sanctions were proper, are simple. Show Garringer a specific statement that he made with reckless disregard of the truth. Then, articulate a rational basis for believing that the statement was made with reckless disregard of the truth after Garringer identifies the pertinent part of record where that fact appears. There is nothing like that in the record here. Petition at 6.

Key to the understanding of the opinion of

lower court may be found in its characterization of Garringer's statements as "scathing statements." App.12 of Petition. The term "scathing", by common definition and usage, means truthful statements when the truth hurts. Such is the case here. Garringer admits that he made scathing statements.

If there had been an attorney conduct rule that stated that "a lawyer shall not make scathing statements," then Garringer would not have made the statements as he would have notice of a rule forbidding such conduct. However there is no such rule. See, Rule 8.2(a) and 8.4(d) of the Indiana Rules of Professional Conduct, Brief In Opposition at 2. The plain meaning of the rules apply. Pavlic & LeFlore -v- Marvel Comics Group, 493 U.S. 120, 123, 107 L.Ed.2d 438, 110 S.Ct. 456 (1989).

If a rule is promulgated that lawyers shall not make scathing statements, then fifty thousand prosecutors are out of a job. If a rule

is tailored so that "lawyers shall not make scathing statements concerning judicial officers," then this is a rule that has yet to be reduced to a writing. Id.

Garringer is first and foremost required by law to uphold the Constitution of the United States, advise the courts when they depart from the law, report wrongdoing to the authorities, and, "never reject, from any consideration personal to myself, the cause of the defenseless and oppressed." Oath of Attorney, Rule 22 of the Indiana Admission and Discipline Rules. Scathing statements, when warranted, sometimes come with the job. Id.

The Brief in Opposition states that, whether an attorney has acted recklessly is to be measured by "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances" citing In Re: Graham, 453 N.W.2d 313 (Minn.- 1990). Brief In Opposition at 6.

If by this, Lundberg means that most lawyers would evaluate the prospect of prevailing, the prospect of getting paid for services rendered, and the prudent course of conduct to advance his career in the profession of law, then we have an understanding of what Lundberg means by "an objective standard" of measuring a lawyer's conduct. Brief In Opposition at 6. However, this is contrary to the plain meaning of the rules. Oath of Attorney, Rule 22 of Indiana Rules of Admission and Discipline, supra.

Conclusion

The Brief In Opposition conclusively demonstrates far departures from the law as the Petition predicted that it would. Petition at 25. Statements made in the Petition may be characterized as "scathing." The Petition conclusively demonstrates that the State of Indiana is a kleptocracy where lawyers routinely steal property entrusted to their care. Petition at 19. In this, Garringer is like the child who

pleaded with "Shoeless Joe" Jackson to "say it ain't so." Tragically, Lundberg cannot say it "ain't so", because it is so, and so proved by pertinent parts of record where that fact appears. This Reply demonstrates that alleged procedural deficiencies articulated in the Brief in Opposition are mere puff and smoke, and not well-taken.

Respectfully Submitted

Donald Mark Garringer